SUPREME COURT, U. S.

NO. ~~1741~~

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

70-199

GENE BALL,

Petitioner

v.

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, HENRY H. WIED, MARGARET WATSON, DAN W. BACON, PAT BRADEN, EARL A. COCHRANE, MAURICE HAUFLER AND C. H. BORCHERS, MEMBERS OF THE BOARD OF TRUSTEES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Joe Mike Egan, Jr.
401 Junction Highway
Kerrville, Texas 78028
Attorney for Petitioner

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The petitioner, Gene Ball, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals rendered on December 17, 1970, reported at 434 F2d 1040 and withdrawn on motion for rehearing on May 4, 1971, appears in Appendix A to this petition at page A-1.

The judgment rendered by the United States Court of Appeals on May 4, 1971, without written opinion on May 4, 1971, appears in Appendix A at page A-2.

The Order of the United States District Court dated March 20, 1970, denying temporary injunction appears in Appendix B at page B-1.

The Order of the United States District Court dated May 13, 1970, to show cause appears in Appendix B at page B-2.

The Order of Dismissal entered by the United States District Court on June 5, 1970, appears in Appendix B at page B-5.

JURISDICTION

1. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

2. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 17, 1970. A timely motion for rehearing was denied on May 4, 1971.

QUESTIONS PRESENTED

Gene Ball, petitioner, filed suit under 42 U.S.C.A. Section 1983 in United States District Court seeking damages and injunctive relief. His suit was dismissed from federal district court due to his failure and/or refusal to exhaust the remedies

available to him in State Court in a good faith adversary manner. At the time of filing, an appeal was and is now pending in State District Court, involving the same general subject matter, from an administrative order in favor of Gene Ball. The order of dismissal entered by the Federal District Court has been upheld and sanctioned by the United States Court of Appeals for the Fifth Circuit without written opinion. The sole question thereby arising is:

> Whether exhaustion of State Remedies can be made pre-requisite to a Section 1983 action under the facts here presented.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, Section 1:

" . . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C.A. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF FACTS

In the present posture of this case, procedural issues only are ripe for review. Whether or not Gene Ball, petitioner, is ultimately entitled to any relief is not here in issue. The sole

question is whether he is entitled to his day in court.

The essential facts lack complexity. Gene Ball has taught math at the Tivy High School in Kerrville, Texas, for the six years immediately preceding the 1969-1970 school year. No hint of criticism as to his competency as a math teacher has been raised during these six years nor is it now. His contract for the 1969-1970 school year was terminated on September 3, 1969, for the sole reason that he refused to shave a Van Dyke-style beard which he cultivated during the summer of 1969. This petition for review on writ of certiorari by the Supreme Court of the United States is a link in the chain of endeavor in which Mr. Ball has been engaged since September 3, 1969, to secure re-instatement to his teaching position at the Tivy High School. The following is a synopsis of his efforts in this regard to date:

(during 1969)

1. September 15; open hearing held before the Board of Trustees of the Kerrville Independent School District. This meeting was convened for the express purpose of hearing evidence or points of view relevant to the earlier termination of Mr. Ball's contract on September 3, 1969;
2. September 23 - closed meeting held by the defendant Board members after which they announced that they would not retract their action of September 3, 1969, at which time they had terminated Mr. Ball's 1969-1970 teaching contract;
3. November 19 - hearing of Mr. Ball's appeal from the defendant Board's action of September 3, had before Dr. Edgar, Commissioner of Education of the State of Texas, in Austin, Texas (Dr. Edgar supported the defendant Board by decision rendered December 11);

(during 1970)

4. January 5 - Hearing of Mr. Ball's appeal from the Commissioner's ruling, had before the State Board of Education in Austin. The State Board of Education is the highest administrative body established to govern public education in Texas. The jurisdictional power of the State Board in such matters as Mr. Ball's appeal is limited to correcting abuse of discretion in lower school

authorities and cannot extend to questions of law. Dallas v. Moseley, 286 S.W. 497 (Tex. Civ. App.) Affirmed 17 S.W.2d 36. The State Board overturned the Commissioner's decision by a vote of 8 - 7. The effect of the State Board's decision was to re-instate Gene Ball to his teaching position and to validate his contract for its entire term. Harkness v. Hutcherson, 38 S.W. 1120 (Tex. Supreme Ct. 1897). On January 5, 1970, Mr. Ball's state remedy was adequate. This was at mid-term in the school year. His one-year teaching contract was still in effect. The time when contracts were to be renewed for the next year was then over two months away. Only the passage of time has caused the State remedy to become inadequate;

5. January 15 - At their next regularly scheduled meeting after Gene Ball's position had been vindicated by the State Board, the local Board of Trustees of the Kerrville Independent School District again considered his case. They took no action;
6. February 17 - At their next regularly scheduled meeting, the local Board of Trustees again considered Gene Ball's case. Again they took no action. That Gene Ball's intention was to resolve his difficulty at the administrative level and out of court entirely is evident in the fact that he awaited action from the local Board of Trustees at two of their regularly scheduled meetings after the State Board had held in his favor and only after they filed their State Court appeal did he take his case to court;
7. February 19 - The Kerrville Independent School District filed appeal in the District Court of Kerr County, Texas, from the decision of the State Board of Education;
8. February 27 - Gene Ball filed suit in United States District Court, seeking re-instatement, back pay and damages. The members of the local Board of Trustees are named defendants in their individual and official capacities. Indication of the substantive claims made in his federal suit are as follows:
   (A) His teaching contract was terminated on September 3, 1969, due to his failure to shave a

Van Dyke style beard he had cultivated during the summer. Stated most conservatively, a First Amendment issue can emerge from such a dispute. Ferrell v. Dallas Independent School District, 393 F2d 697 (5th Cir. 1968); Finot v. Pasadena Board of Education, 58 Cal. 520 (1967); Compare, Burnside v. Byers, 363 F2d 744 (5th Cir. 1966) with Blackwell v. Issaquena County Board of Education, 363 F2d 749 (5th Cir. 1966). Some courts have found it unnecessary to reach the First Amendment question, having catagorized the right of an adult, male or female, to present himself or herself physically to the world as he or she chooses to be, a highly protected freedom under the Fourteenth Amendment. Breen v. Kahl, 296 F. Supp. 702 (D.Wis. 1969) Affm. 419 F2d 1034, cert. denied 398 U.S. 937. In Ferrell, the majority opinion written by Judge Gewin assumes hair styles to be entitled to First Amendment protection. The concurring opinion of Judge Godbold and the dissenting opinion of Judge Tuttle (which together constitute a majority of the court) go far beyond the mere assumption of such protection. In later writings of the Fifth Circuit (Brooks v. Auburn University, 412 F2d 1171 (5th Cir. 1969) and of district courts within the Circuit (Perry v. Grenada Mun. Sep. School Dist. 300 F. Supp. 748 (N.D. Miss. 1969), Ferrell, is recognized and treated as a First Amendment decision;

(B) On September 3, 1969 Mr. Ball's teaching contract was terminated by defendants at a specially called meeting held on, at the most, 3½ hours notice to him and in his absence. Perhaps the requirement of Texas Law (Art. 6252 V.A.C.S.) that such meetings be held on no less than three day notice can furnish guidance here. If this three day requirement falls short of constitutional gravity, nevertheless 3½ hours notice is too short to meet constitutional muster where everything is at stake as here. See: 81 Harv. L.R. at 1452. In this

instance, this violation of procedural due-process guaranteed by the Fourteenth Amendment is compounded by the fact that no rule exists in the Kerrville Independent School District that teachers not wear beards. See: Lucia v. Duggan, 303 F. Supp. 112 (D.C. Mass 1969) See Also: Lucas v. Chapman, 430 F2d 945 (5th Cir. 1970);

(C) Under the equal protection clause of the Fourteenth Amendment it makes no difference that the threatened interest is a privilege rather than a right. Even a privilege cannot be granted to some but withheld from others where the basis of classification is arbitrary. See: 81 Harv. L.R. 1439 at 1454 et seq. Mr. Ball was directed to shave his beard to make it easier to enforce the policy that students be clean shaven. The administration concedes that two members of the faculty were then wearing mustaches although students are forbidden mustaches as well as beards;

(D) That lack of tenure is no defense to an allegation that a renewal contract was denied a teacher because he sought to exercise his rights under the First and Fourteenth Amendments of the Constitution is well established within the Fifth Circuit. Pred v. Board of Public Instruction, 415 F2d 851 (1969); Ferguson v. Thomas, 430 F2d 852 (5th Cir. 1970); Lucas v. Chapman, 430 F2d 945 (5th Cir. 1970); Johnson v. Branch, 364 F2d 177 (4th Cir. 1966); Greene v. Howard University, 412 F2d 1128 (D.C. Cir. 1969); Jones v. Hopper, 410 F2d 1323 (10th Cir. 1969).

The above is intended only as brief indication of substantive issues raised by the pleadings. The only purpose here is to show such claims to be both federal and substantial in nature;

9. March 20, 1970 - Hearing had in United States District Court on Mr. Ball's motion for temporary injunction. Motion denied. The Court further ordered that a hearing on the merits would be set immediately upon completion of what were characterized by the court as

administrative proceedings pending in State Court;

10. April 2, 1970 - Plaintiff filed Second Amended Answer in the State Court appeal then and now pending in the Second 38th District Court of Kerr County, Texas, in effect, inviting the State Court to hold adversely to him on the asserted ground that he had neither the financial resources nor the time to engage in appellate action in the State Court which would probably follow were he successful at the trial level (Mr. Ball had reserved his federal issues for later determination by the federal court under the doctrine of England v. Louisiana State Board of Med. Exam., 375 U.S. 411 (1964) therefore effectively removing the issue of reinstatement for next fall from the scope of the State proceeding);
11. May 13, 1970 - Show Cause Order entered by United States District Court requiring Mr. Ball to show cause why his federal case should not be dismissed in the event that he either failed or refused to contest the State Court proceeding in good faith effort to win it. The order stated that "England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in Federal Court by the simple expedient of informing the State Court 'that he intends, should the State Court hold against him on the question of state law, to return to the District Court for disposition of his federal contention";
12. June 5, 1970 - Order of Dismissal entered by the United States District Court due to Gene Ball's failure and/or refusal to exhaust the administrative remedies available to him in State Court.

In view of the original opinion rendered on December 17, 1970 by the Court of Appeals it seems in order to clearly delineate here that the dismissal from district court was solely on procedural grounds. Gene Ball's case was not dismissed from federal district court for failure to state a cause of action, or on summary judgment, or for any reason which reflects on the merit of his federal claims. While neither then nor now presented as findings of the court, two expressions from the bench are

indicative that the district court did not regard Gene Ball's federal claims to lack substance on their merits. On page 169 of the record from the hearing on application for temporary injuction, the court observed:

> "*Now, if this had happened about the time the school year began, I don't think I would have been hesitant in granting a temporary injunction on the state of the record as it is now, but what I am concerned about is the fact that we are toward the end of the school year."

*emphasis supplied

and on page 172 is found the following statement of the court:

> "*I think that he has raised a serious constitutional issue in this case, a very serious issue, and I certainly do not want to do anything to deprive him of the right to litigate it in this court if he feels that at some time he has not had full opportunity to do so in the state court, *but I do not think that in the meantime that I should interfere with the processes that are now in motion in the state court."

*emphasis supplied

The above are, at most, offhand expressions by the Court and based on a record not then or now fully developed on its merits. They are quoted here solely because so clearly indicative that Gene Ball's federal claims were not regarded as unsubstantial by the district court after the record had developed to its present posture. Whether or not Gene Ball had any federally protected substantive right which had been violated is simply a question not ripe for review. The issues presented for review involve remedies rather than rights. They are procedural rather than substantive. As reflected in the language quoted from the bench as well as from the orders of the District Court issued March 23, 1970 (denying temporary injuction); May 13, 1970 (show cause); and June 5, 1970 (dismissal), it is clear

that the substantive merit (or lack of it) of Mr. Ball's federal claims had no part in the dismissal of his suit from federal court;

13. December 17, 1970 - Gene Ball's appeal to the Court of Appeals for the Fifth Circuit was denied. Speaking per curium, the court expressed its reasoning as follows:

> "The Appellant, Gene Ball, has not demonstrated that he has any federally protected right which has been violated; and

(in 1971)

14. May 4, 1971 - On petition for rehearing, the Court of Appeals withdrew its original opinion and substituted the following:

> "Judgment Affirmed. See Local Rule 21."

Gene Ball's petition for rehearing en banc was also denied, the Court having been polled at the request of one of its members and the majority of the Circuit Judges in active service not having voted in favor of it.

REASONS FOR GRANTING THE WRIT

1. The order of dismissal entered by the District Court and sanctioned by the Court of Appeals directly conflicts with this Court's rulings in Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); and with the recent holdings of the Fifth Circuit in Moreno v. Henckel, 431 F2d 1299 (5th Cir. 1970) and Rainey v. Jackson State College, 435 F2d 1031 (5th Cir. 1970).

Where the facts pleaded, as in Gene Ball's complaint filed in United States District Court, are adequate to bring the case under Title 42, U.S.C.A. Section 1983 jurisdiction, exercise of such jurisdiction cannot be predicated on exhaustion of state remedies. In reversing a three-judge court in Damico v. California, 389 U.S. 416 (1967), this Court treated the question as one governed by settled law:

> ". . . The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court

> that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error. In McNeese v. Board of Education, 373 U.S. 668, noting that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any the state might have,' id., at 672, 10 L ed 2d at 625, we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' id., at 671, 10 L. ed 2d at 625. See Monroe v. Pape, 365 U.S. 167, 180-183."

The principle that when federal jurisdiction is invoked under 42 U.S.C.A. Section 1983, the federal remedy is supplemental to any that the state might offer, first enunciated in Monroe v. Pape, 365 U.S. 167 (1961) and fortified in McNeese v. Board of Education, 373 U.S. 668 (1963) is now axiomatic in law and does not warrant further discussion. The Fifth Circuit is in accord. See; Moreno v. Henckel, 431 F2d 1299 (5th Cir. 1970); Rainey v. Jackson State College, 435 F2d 1031 (1970).

Gene Ball originally misunderstood the import of the District Court's ruling of March 21, 1970. He understood this ruling to have been grounded on principles of comity – that the federal court to preserve the delicate balance which exists between state and federal courts would stay its hand during the pendency of the state suit. Only upon receipt of the Show Cause Order of May 13, 1970, did Gene Ball understand that it was exhaustion of state remedies which was required of him. This is borne out by the order of dismissal entered by the District Court on June 5, 1970, which is based on his "failure and/or refusal to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner."

2. Even assuming exhaustion could be required, there is here no adequate state remedy.

Mr. Ball's 1969-1970 teaching contract is for one year only. In accordance with Art. 2781, V.A.C.S., the predecessor to Section 23.28 of the Texas Education Code, it commenced July 1, 1969, and terminated June 30, 1970. The Kerrville Independent School District has not adopted the provisions of

the probationary or continuing contract law as set out in Section 21.201, et seq., of the Texas Education Code. As under its predecessor, Art. 2891-50, V.A.C.S., the said Section 21.201 is discretionary, in that a school board is given the choice of coming under the Act. by adopting the tenure plan set out in said Act, or continuing to contract under prior laws. Op. Atty. Gen. 1967, No. M-123; see also: Section 23.28 (e), Tex. Ed. Code. Thus Mr. Ball is without shelter in the form of tenure. It is of no consequence that the public policy of the state would have permitted a contract for a longer term (up to three years in Districts where the scholastic population is less than 5,000, as here - Art. 2781, V.A.C.S. and Sec. 23.28 of Tex. Ed. Code). The fact is that his contract was for one year only and that the year with which it was concerned is now history.

Remedies under Texas law available to a discharged teacher in Mr. Ball's situation all begin and end with whatever rights he may have under his contract. Where, as here, the State Board has determined that a teacher has been improperly discharged, the decision has the effect of re-instating the teacher and of making his contract good from the beginning. Harkness v. Hutcherson, 38 S.W. 1120 (Tex. 1897); Brazoria Ind. School Dist. v. Weems, 295 S.W. 268 (Tex. Civ. App. 1927); Gragg v. Hill, 58 S.W. 2d 150 (Tex. Civ. App. 1933); 51 Tex. Jur. 2nd at 562. Harkness involved only claims for damages to be measured by unpaid salary under teaching contracts. In Brazoria, a two-year contract of a school prinicpal was an issue. Back pay was ordered and the principal re-instated for the unexpired term of her contract. Ramos v. Guerra, 311 S.W. 2d 869 (Tex. Civ. App. 1953) is the only Texas case found by petitioner where only injunctive relief was sought by a discharged teacher. Injunctive relief, limited to the teacher's contract year, was therein granted. The important thread running in common through each holding cited above is that, even where successful as to injunctive relief sought as well as monetary damages, relief is limited in terms of time as well as dollars to rights acquired under the teaching contract.

Time has run out under Mr. Ball's contract. No higher authority need be cited for the declaration that school authorities have limited discretion in Texas in the matter of teacher dismissal than the action of the State Board with

respect to Mr. Ball. But this limited discretion is only with reference to teachers who are already under contract. No limitation, whatsoever, is imposed upon local Boards of Trustees in the matter of renewal of teaching contracts. Perhaps this is in recognition of generally accepted principles of freedom of contract. Perhaps it reflects recognition of public policy to give school officials as free a hand as possible. As stated in Underwood v. Sabinal Independent School Dist. 275 S.W. 267 (Tex. Civ. App. 1925);

> "The Legislature has sought to place the public free system in a position of freedom from interference by the courts so far as practical. Donna Independent School Dist. v. Bank (Tex. Civ. App.) 227 S.W. 974; South San Antonio School Dist. v. Martine (Tex. Civ. App.)

Whatever the reason, the affect is to deny Mr. Ball even an arguable basis under Texas law upon which he could support a claim to re-instatement to his teaching position next year.

It perhaps cannot be emphasized too strongly that Gene Ball does not claim a vested right in his Federal Sec. 1983 action to be employed by the State of Texas (as personified by the Kerrville Independent School District). Rather he asserts that an opportunity of employment by the State is being denied him because he sought to exercise rights guaranteed under the First and Fourteenth Amendments.

Re-instatement is the heart of the controversy. In addition to re-instatement and back pay, however, Mr. Ball also seeks damages from defendants. Under general principles of immunity of government officials while acting in a governmental capacity, Mr. Ball is denied a remedy under Texas Law to recover such damages. Campbell v. Jones, 264 S.W. 2d 425 (Tex.).

It is, therefore, submitted that no state remedy, either adequate or otherwise, is provided by the State of Texas which could even arguably support Mr. Ball's asserted right to re-instatement next year or his damage claims (except back pay for his 1969-1970 teaching year) against the defendants.

3. Abstention is neither involved nor would it be appropriate.

The District Court's order of dismissal, as allowed to stand by the Fifth Circuit, is based on failure to exhaust state remedies. Abstention is not here involved. Language in Wisconsin v. Constantineau, 91 U.S. Supreme Ct. 507 (January 19, 1971) with reference to abstention – "the fact that Wisconsin does not raise the point does not mean that it lacks merit" – would seem to give cause, however, to negate the applicability of the doctrine to Gene Ball's case. In Wisconsin this Court stated:

> "'. . . But the abstention rule only applies where the issue of state law is uncertain.' Harman v. Forsenius, 380 U.S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. Reetz v. Bozanich, supra; Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639."

No unsettled question of state law here exists, the determination of which could avoid or modify the constitutional question (Zwiekler v. Koota, 389 U.S. 241); no attack is here made on the constitutionality of a state statute where state court construction thereof could render constitutional decision unnecessary (Reetz v Bozanich, 397 U.S. 82); no state court is here performing in a legislative capacity (Burford v. Sun Oil Co., 319 U.S. 315). The questions in Gene Ball's Section 1983 federal action are all federal questions based on the First and Fourteenth Amendments to the Constitution of the United States.

In County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, (1959) this Court specifically held abstention not applicable nor hazard of unsettling some delicate balance in the area of federal-state relationships to exist merely because state and federal suits involving the same subject matter were proceeding side by side and judgment in the federal suit would render the state proceeding moot.

4. En personam actions involving the same subject matter can proceed side by side in Federal Court and in State Court until one goes to judgment.

Kline v. Burke Construction Co., 260 U.S. 226, settled the

governing principle. In that case federal diversity jurisdiction had been invoked to adjudicate an alleged breach of contract. The defendant in the federal court proceeding had initiated a suit in a state court to adjudicate the same issue. The Court of Appeals ruled that the Federal District Court should have issued a requested injunction to stay the state court proceedings. This Court held that a statute similar to present Section 2288 barred the injunction, but that the District Court could adjudicate the breach of contract issue even though its holding would be decisive of the state case.

That the State Court appeal now pending in Kerr County, Texas, is judicial rather than administrative in character is apparent from comparison of Prentis v. Atlantic Coast Line Co. 211 U.S. 210 (1908) with Railroad and Warehouse Commission v. Duluth Street R. Co., 273 U.S. 625 (1927). Both opinions were written by Mr. Justice Holmes. In both cases railroads had initiated state administrative procedures, but had balked at following the state appellate process into state court. The railroads elected in both cases to file suit in federal court instead.

In Prentiss the railroad was required to first complete the State Court appellate process. In Duluth, the railroad was permitted to pursue its constitutional claim in federal court. The single, but vital, distinction found by Mr. Justice Holmes to exist between the two cases was that in Prentiss the state court was performing in a legislative capacity, but in Duluth the state court was performing judicially. Mr. Justice Holmes reasoned that legislation looks to the future and, therefore, cannot become res-judicata. A judicial inquiry, on the other hand, investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. As the state court in Duluth was performing in a judicial capacity, this Court held that even the possibility of res-judicata was sufficient reason to allow the federal suit to proceed.

Under this test the inquiry in the State Court suit is clearly judicial. It follows that Kline v. Burke, supra, would govern, even if the issue here were simply whether federal and state lawsuits were to be allowed to proceed side-by-side, rather than whether exhaustion of remedies in State Court can be made predicate to exercise of federal jurisdiction under Section 1983.

5. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) cannot afford Gene Ball a second opportunity to litigate his federal claims.

In its order to show cause entered May 13, 1970, the federal District Court recognized that England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) afforded Gene Ball a method of reserving his federal claims from the scope of the state proceeding thereby avoiding the harsh consequences of res-judicata. But only Gene Ball's federal claims can support his asserted right to re-instatement or his damage claims other than for back pay for the 1969-1970 school year. His theoretical right to reserve these claims from the state proceeding does not, in effect, afford him two bites at the apple, as does, for example, the habeas corpus exhaustion requirement, 28 U.S.C.A., Section 2254. In the State Court appeal filed by the Kerrville Independent School District there is simply no state statute to be construed "in light of" Gene Ball's federal claims. The only possible way he can put his claim to re-instatement or damages other than back pay for the one year before the State Court would be by election to litigate them fully there. Such election would clearly constitute a bar rather than a condition to subsequent litigation of such federal issues in federal court. In the introductory paragraph to Brown v. Chastain, 416 F2d 1012 (5th Cir. 1969), the court stated:

> "We are here presented with the question whether the District Court had jurisdiction to directly review a *final determination of federal constitutional questions voluntarily submitted to and decided by the state courts of Florida in connection with litigation pending in the state courts, no review by the United States Supreme Court having been sought. *The District Court had no jurisdiction and we reverse."
> *emphasis supplied.

6. Gene Ball has not waived his right to pursue his federal claims in Federal Court nor is he estopped from proceeding in Federal Court due to the fact that he first availed himself of opportunities of administrative review made available under

Texas law.

Estoppel and waiver are principles of the law of contracts. The following is what Mr Justice Holmes had to say in response to a similar assertion of such a contract in Railroad and Warehouse Commission v. Duluth St. R. Co., supra,:

> "The argument that plaintiff is barred by a contract needs but a word. Assume for purposes of decision that the plaintiff by coming in under the State Law made a contract and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to say that it did more than adopt that method in its general character and with its ordinary incidents. If apart from the supposed contract a party would have been entitled to go to the Court of the United States at the stage when the plaintiff went there – no reasonable interpretation of the contract forbade the plaintiff to go and there is no need to consider whether the contract could have forbidden it if it tried."

See also: Thompson v. Gibbs, 60 F. Supp. 872 (E.D.S. Car. 1945) and cases cited therein.

Gene Ball did not initiate the proceeding now pending in State District Court (Appeal by School District from adverse ruling by State Board of Education). His only part in making it possible was having obtained a favorable ruling before the State Board of Education. His entire participation in the State Court proceeding is directed toward escaping with the least possible prejudice to his right to litigate his federal claims in federal court (by reservation of such claims from the scope of the State proceeding).

In England v. Louisiana State Board of Medical Examiners, supra, the petitioner had initiated action in federal district court and had been relegated to the state court by application of the abstention doctrine. Gene Ball, on the other hand, has presented his case to every administrative body created by the

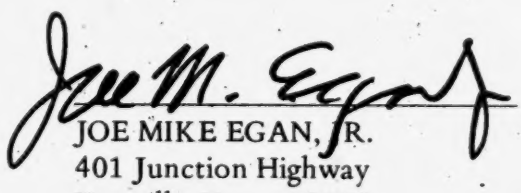
State to hear such matters, but draws the line at presenting his claims to the State Court.

Very different from the above were the procedural happenings in Sweetbriar Institute v. Button, 280 F. Supp. 312 (N.D. Va. 1967), reversed by this Court, 387 U.S. 423. In Sweetbriar, the petitioner had taken the two extra steps which Gene Ball would carefully avoid. He had (1) of his own volition and prior to the filing of his federal suit, filed his case in State Court and (2) had presented his federal claims to the state court where they had been fully litigated. Only after his federal claims had been litigated in the State Court and only a formal decree remained to be entered, did the petitioner there amend his State complaint, asking the State Court to dispose of the question of State law in light of his federal contentions and reserving his right to return to the federal court for disposition of his federal claims. The district court, after finding dismissal warranted under the teachings of England, abstained, in lieu of dismissing the case, expressly to avoid possibility of injury to the petitioner. This Court, in summarily reversing the district court's abstention order and ordering that the case be re-instated for hearing cited England and Kline v. Burke Construction Co., supra.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

Respectfully submitted,



JOE MIKE EGAN, JR.
401 Junction Highway
Kerrville, Texas 78028
Counsel for petitioner

CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, for filing that I personally delivered to the office of LAVERN D. HARRIS, Realty and Trust Building, Kerrville, Texas 78028, sole counsel for all respondents, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court.

Joe M. Egan

JOE MIKE EGAN, JR.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30063

GENE BALL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

(December 17, 1970)

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The Appellant, Gene Ball, has not demonstrated that he has any Federally protected right which has been violated. The judgment of the district court is

AFFIRMED.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30063

GENE BALL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF KIERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

(May 4, 1971)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The opinion originally issued in this case is hereby withdrawn and the following opinion is substituted therefor:

Judgment AFFIRMED. See Local Rule 21.[1]

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

[1]See NLRB v Amalgamated Clothing Workers of America, 430 F2d 966 (5th Cir. 1970).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X	
	X	
V.	X	CIVIL ACTION
BOARD OF TRUSTEES OF THE	X	SA 70CA88
KERRVILLE INDEPENDENT SCHOOL	X	
DISTRICT, ET AL	X	

ORDER DENYING TEMPORARY INJUNCTION

On the 20th day of March, 1970, came on for consideration the plaintiff's motion for temporary injunction; and the Court having fully considered the pleadings, the evidence, the briefs and the arguments of counsel, is of the opinion that the motion for temporary injunction should be and the same is hereby DENIED.

It is further ordered that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas.

Entered this 23rd day of March, 1970.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X	
	X	
V.	X	CIVIL ACTION
	X	NO. SA70CA88
BOARD OF TRUSTEES OF THE	X	
KERRVILLE INDEPENDENT SCHOOL	X	
DISTRICT, HENRY H. WIED	X	
MARGARET WATSON, DAN W. BACON,	X	
MAURICE HAUFLER, EARL A.	X	
COCHRANE, PAT BRADEN and	X	
C. H. BORCHERS, members of	X	
THE BOARD OF TRUSTEES, indi-	X	
vidually and in their official	X	
capacities	X	

ORDER TO SHOW CAUSE

On this the 13th day of May 1970, it appearing that on March 23, 1970 this Court denied plaintiff's motion for temporary injunction and ordered "that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas"; and

It further appearing that on May 1, 1970 plaintiff filed his "First Amended Complaint", accompanied by his "Sixth Brief", to which was attached a copy of a "Second Amended Answer" filed by plaintiff as appellee in Cause No. 6405, in said Second 38th District Court of Kerr County, Texas, in which Second Amended Answer plaintiff seeks to withdraw his pleas in abatement and/or motions to dismiss number one and two, and invites the State Court to dispose of the pending litigation adversely to him; and

It further appearing that the course being pursued by plaintiff in the State Court is contrary to the spirit, if not the letter, of this Court's order of March 23, 1970, which contemplated a good faith attempt on plaintiff's part to complete the proceedings in the State Court in an adversary manner; and

It further appearing that in and by said order of March 23, 1970 this Court acknowledged its intention to hold a hearing on the merits of this cause in order to consider any federal claims remaining after completion of the administrative proceedings in the State Court; and

It futher appearing that the Supreme Court of the United States, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in Federal Court by the simple expedient of informing the State Court "that he intends, should the State Courts hold against him on the question of state law, to return to the District Court for disposition of his federal contention"; and

It further appearing that proper court administration, and the preservation of the delicate balance between the State and Federal Courts, demand that the lawsuit now pending in the Second 38th District Court of Kerr County, Texas, be completed as a good faith adversary proceeding; it is, therefore,

ORDERED that not later than Wednesday, May 20, 1970, the plaintiff shall show cause in writing, with a copy to opposing counsel, why, in the event he either fails or refuses to contest the cause pending in the State Court in a good faith effort to win it, this cause should not be dismissed for failure and/or refusal to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner.

Within five (5) days thereafter, defendants are directed to reply thereto in writing, with a copy to opposing counsel.

Entered this 13th day of May 1970.

s/Adrian A. Spears
Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X
	X
V.	X
	X
BOARD OF TRUSTEES OF	X
KERRVILLE INDEPENDENT	X
SCHOOL DISTRICT, et al	X

ORDER OF DISMISSAL

On this the 5th day of June, 1970, came on to be considered the Court's order entered herein on May 13, 1970, requiring plaintiff to show cause in writing why, in the event he either fails or refuses to contest the cause pending in the State Court in good faith effort to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner. Having considered said order, together with the responses and briefs by the parties herein, along with plaintiff's representation of his intention not to exhaust said administrative remedies, this Court is of the opinion that plaintiff has failed to show cause why this case should not be dismissed. It is, therefore,

ORDERED, ADJUDGED and DECREED that this cause be and it is hereby dismissed, without prejudice, however, to plaintiff's right to petition the court for reinstatement of this cause for the purpose of considering any federal claims remaining after completion of the administrative proceedings pending in the State Court; provided such administrative proceedings are completed by plaintiff in a good faith adversary manner.

SO ORDERED this 5th day of June, 1970 at San Antonio, Texas.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge

Supreme Court, U.S.
FILED
JUN 24 1971

~~NO. 1741~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

70-199

GENE BALL,
Petitioner

v.

BOARD OF TRUSTEES OF THE
KERRVILLE INDEPENDENT SCHOOL DISTRICT,
HENRY H. WIED, MARGARET WATSON,
DAN W. BACON, PAT BRADEN,
EARL A. COCHRANE, MAURICE HAUFLER
AND C. H. BORCHERS, MEMBERS OF THE
BOARD OF TRUSTEES, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lavern D. Harris
Realty & Trust Building
Kerrville, Texas 78028
Attorney for Respondents

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The respondents, Board of Trustees of the Kerrville Independent School District, Henry H. Wied, Margaret Watson, Dan W. Bacon, Pat Braden, Earl A. Cochrane, Maurice Haufler and C. H. Borchers, members of the Board of Trustees, individually and in their official capacities, pray that the petition of petitioner, Gene Ball, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case, be denied.

OPINIONS BELOW

The opinions below are correctly set forth in Appendix A and B of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; however, respondents have added the opinion and decision of Dr. J. W. Edgar, Commissioner of Education of the State of Texas, dated December 11, 1969, shown in Appendix A to this respondents' opposition brief at page A-1.

JURISDICTION

Respondents do not contest jurisdiction of this Court.

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the United States District Court in dismissing petitioner's [Gene Ball's] cause of action, if any he may have, without prejudice, however, to Gene Ball's right to petition the court for reinstatement of such cause to consider any federal claims remaining after completion of the administrative proceedings pending in the State Court, provided such administrative proceedings are completed by Gene Ball in a good faith adversary manner?

Respondents, hereinafter referred to as 'School District,' are dissatisfied with petitioner's statement of the question presented.

STATEMENT OF THE FACTS

The School District has never had opportunity to present testimony on the competency of petitioner as a teacher. The matter of his competency is not in issue before this Honorable Court, and for the purpose of this appeal is immaterial.

Petitioner's contract was not terminated until September 23, 1969, after lengthy hearings, including an open public hearing on September 15, 1969.

Although not in issue before this Honorable Court, but for the purposes of this appeal from the Order of Dismissal, and without a full hearing on the merits, the reasons for such termination of petitioner's teaching contract are more fairly and accurately set forth by Dr. J. W. Edgar, Commissioner of Education of the State of Texas, in the Commissioner's Statement of Case and Decision dated December 11, 1969, and shown in Appendix A, at page A-1, in this respondents' brief in opposition to petitioner's petition for writ of certiorari.

The School District cannot agree with petitioner's presentation of the Statement of Facts because it is infiltrated and surrounded by petitioner's arguments and authorities cited. The School District would respectfully submit the following as the Statement of Facts.

1. That during the summer months of the year 1969, when school was not in session, petitioner allowed his hair to grow long and he grew a beard and mustache. During the summer months of other years when school was not in session, petitioner had grown a beard and mustache, but had each year always, except for the year 1969, shaved off his beard and mustache prior to the beginning of the school year. Petitioner was aware of the School District's rule, regulation and policy that all male teachers were to be clean shaven, except that neatly groomed, closely trimmed mustaches would be permitted, and he had complied with such rules, regulations and policies for all years prior to the year 1969.

2. That prior to the general faculty meeting held before the commencement of the school year 1969-1970, the

superintendent and the principal of Tivy High School, the school to which petitioner was assigned as a math teacher, were contacted by many citizens concerning the appearance of petitioner, and requests by several citizens of the school district were made that their children not be assigned to the class where petitioner would be assigned to teach.

3. That at the general faculty meeting of said school district held on the 29th day of August, 1969, the petitioner attended said meeting wearing a beard and mustache and the appearance of petitioner at such meeting had a disruptive effect on the meeting. In the afternoon of August 29, 1969, the superintendent of said school district had a conference with petitioner concerning the whole problem and requested that petitioner shave, and that the whole matter would be at an end. Petitioner refused, whereupon the superintendent, in the furtherance of the fulfillment of school policy, the educational purpose and the best interest of the school district, advised petitioner that he was suspended until September 2, 1969, to consider the request.

4. That on the opening day of the school year 1969-1970, the same being September 2, 1969, petitioner appeared at Tivy High School wearing the said beard and mustache and was informed by the high school principal that he was suspended from teaching math classes in the school. Petitioner would not accept said suspension except after the time he was officially on the job and in the presence of witnesses; therefore, after 8:00 o'clock A. M., the said principal had to take two faculty members of said high school away from their teaching duties on opening day of school to go to the room where petitioner was in order to inform him of such suspension. Shortly thereafter, petitioner again had a conference with the superintendent of said school district and petitioner was advised that if he would shave off his beard he could return to his classes. Petitioner refused to comply with such school rule,

regulation and policy and such request. The superintendent suspended petitioner from further teaching and advised petitioner that he would recommend to the Board of Trustees of said school district that petitioner's contract be terminated and that the same could be averted if petitioner chose to comply with such reasonable request.

5. Petitioner was duly notified that a meeting of the Board of Trustees of said school district was called for 5:00 o'clock P. M. on September 3, 1969, to consider the termination of his contract, and petitioner was invited to attend such meeting in person and with counsel, if he desired. Petitioner advised the school district that he did not choose to attend, but might elect to appear at a later date. The superintendent of the school district recommended to the Board of Trustees that petitioner's contract for the school year 1969-1970 be terminated for the reasons that petitioner was uncooperative, insubordinate, disruptive, disturbing, having a retarding effect on teaching and learning, failing to promote decorum, dignity, and proper atmosphere, violating the terms and spirit of his contract, and that the request was a reasonable request under existing administrative policy. Further, such request was being made to advance the best interest of the school and its students and faculty. The matter was discussed at length by the said Board of Trustees, including the matter of petitioner's agreement to be governed by the rules, regulations and policy of the school district, the superintendent of schools and the principal, and the matter of petitioner's agreement to teach to the best of his skill and ability. Also discussed was the matter of distraction from petitioner's ability to teach under the circumstances, and of primary importance, the effect of the learning of the students, the problem of enforcing discipline and the challenge to school authority and its effect on the students and the school as a whole, as well as the adverse effects which distract from the purpose of education. After having considered all of said matters, in the best interest of said school district and in the light of the duties imposed upon the Board of Trustees of said

school district for the furtherance of purposes of education, the Board of Trustees voted unanimously to terminate the contract of petitioner. It was understood, however, that if petitioner wanted to be heard on the matter, he would have a hearing upon his request.

6. That subsequent to said meeting of the Board of Trustees of the Kerrville Independent School District held on the 3rd day of September, 1969, petitioner requested that he be granted a further hearing on said matter. That on the 15th day of September, 1969, the Board of Trustees did hold a rehearing on the matter of the termination of such contract of petitioner, which meeting was an open public meeting wherein the Board of Trustees of the school district heard lengthy evidence, testimony and opinions from the numerous persons in attendance. Petitioner was present in person and represented by counsel and they, as well as any other person desiring to give evidence and testimony and express an opinion, were all fully heard at length. Petitioner and his counsel were given full opportunity to cross-examine any witness. Further, petitioner through his attorney, presented argument and cited authorities to the Board of Trustees. Said Board of Trustees reheard such matter in its entirety and reconsidered the same afresh with an open mind, and, further, said Board of Trustees did not act hastily, but deferred making a ruling to a later date after having had an opportunity to study the matter in depth.

7. That on the 23rd day of September, 1969, the Board of Trustees of the school district met again and further discussed and considered the entire matter relating to the termination of petitioner's contract. It was the opinion of such Board of Trustees, after having heard and reheard, considered and reconsidered, all matters in connection with the termination of petitioner's contract, that petitioner's contract should [redacted]inated for all or any one or more of the reasons given in the recommendation of the superintendent of schools. Further, the Board of Trustees found that such ruling is reasonable, necessary

and for the best interests of the school district and that the same is not being applied in an arbitrary or capricious manner. By a unanimous vote of all seven of the members of the Board of Trustees, it was decided that petitioner's contract should be terminated for the best interests of the school district.

In further action of said Board of Trustees at such meeting, it was resolved that the school district pay to petitioner a sum of money which would be equal to his normal September salary had he been employed by the school district, for the reason that the Board of Trustees desired to deal with petitioner in the utmost fairness during the time required to consider the entire matter anew and reach its decision as aforesaid that the decision of the Board of Trustees of the school district set forth in the minutes of such board meeting dated September 3, 1969, stand unaltered for the best interests of the school district.

8. Petitioner appealed from the decision of the Board of Trustees which terminated his contract for the school year 1969-1970 to Dr. J. W. Edgar, Commissioner of Education of the State of Texas, and a hearing on said appeal was had in the Conference Room of the Texas Education Agency Building in Austin, Travis County, Texas, before the said State Commissioner of Education on the 19th day of November, 1969, at which time both the petitioner and School District introduced their testimony relating to the aforesaid matters in controversy between them, and a transcript was made of the same. Also, both parties were represented by counsel and citation of many authorities was presented to said State Commissioner of Education. That on the 11th day of December, 1969, Dr. J. W. Edgar, State Commissioner of Education, handed down his opinion and decision, a copy of which is set forth in Appendix A, page A-1 to this respondents' brief in opposition to petitioner's petition for writ of certiorari.

9. The opinion and decision of the State Commissioner of Education handed down on December 11, 1969, having

been adverse to petitioner, an appeal was taken by petitioner to the State Board of Education of the State of Texas. At a public meeting of the State Board of Education held on January 5, 1970, in Austin, Texas, the State Board of Education, by a vote of eight (8) to seven (7) reversed the decision of the State Commissioner of Education. Some uncertainty existed as to exactly what the State Board of Education had actually ordered because of certain statements and announcements made by members of the State Board of Education at said public hearing; therefore, a copy of the minutes or the written order as actually entered by said Board of Education was requested. On February 13, 1970, a true and correct copy of excerpts appearing in the Minutes of the State Board of Education for January 5, 1970, was prepared by the State Commissioner of Education and forwarded to the attorneys for petitioner and School District.

10. The decision of the State Board of Education having been adverse to the Board of Trustees, an appeal was taken by the School District to the District Court of Kerr County, Texas. Said appeal by the School District was filed on February 19, 1970, the same being Cause No. 6405, in a suit styled Gene Ball vs. Kerrville Independent School District, in the District Court of Kerr County, Texas, Second 38th Judicial District, and service of citation was had on Gene Ball on the 20th day of February, 1970.

11. On February 27, 1970, petitioner filed suit in the United States District Court for the Western District of Texas, San Antonio Division, to declare that the School District could not terminate his teaching contract for the 1969-1970 school year or refuse to award him renewal contracts for subsequent years; for a preliminary injunction, and upon final hearing, a permanent injunction directing the School District to reinstate petitioner as a teacher and to refrain from refusing petitioner a new contract for subsequent years; for damages, attorney's fees and costs.

12. After a hearing had on March 20, 1970, before the United States District Court, the court denied petitioner's motion for a temporary injunction and ordered a hearing on the merits of the cause immediately after completion of the administrative proceedings now pending in the Second 38th Judicial District Court of Kerr County, Texas. (Copy of the Order of the United States District Court is shown on page B-1 in Appendix B to petitioner's petition for writ of certiorari.)

13. Shortly after March 20, 1970, the Judge of the Second 38th Judicial District Court of Kerr County, Texas, set the date of the trial on the merits of the administrative proceedings then pending in said State Court for May 20, 1970, but, at the instance of petitioner, it was continued. Petitioner, through his attorney, requested that the administrative proceedings now pending in the State Court not be set for trial pending appeal and until he requested a setting of the cause for trial. The State District Court is ready to afford a prompt hearing of said proceedings whenever petitioner is ready to proceed to trial. This is an important fact bearing upon the issue of the adequacy of the State administrative remedy. It is also important because of the bearing it has upon the record petitioner has created and then about which he complains.

14. The School District has no disagreement with the synopsis of events occurring from April 2, 1970 through May 4, 1971 set forth in petitioner's petition for writ of certiorari, including all applicable orders and judgments set forth in Appendix A and B to his petition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The School District's action of appeal to the District Court of Kerr County, Texas, is a part of the administrative process and the remedy by way of appeal to such State Court is an administrative one. The fact that in the State Court the School District is attacking the jurisdiction of the State Board of Education to make its ruling and asking for a trial de novo,

among other things, certainly does not alter the fact that the School District is also pursuing the administrative process and the remedy by way of appeal to such State Court. The fact, that at the same time and in the same State Court action where the School District, in following and pursuing a part of the administrative process, is also attacking the jurisdiction of the State Board of Education and asking for other matters, does not destroy or take away from the fact that the School District is perfecting and pursuing its administrative remedy of right to appeal to the district court of the county in which such school district lies on the ground that the decision of the said State Board is not supported in the record; is arbitrary and capricious, and is in error in the application of existing law to the facts of the case.

The mere fact that the remedy available to the School District after the State Board of Education made its decision is before the State District Court does not make it a judicial action, at least insofar as the School District's appeal from said adverse decision is concerned, for such appeal is but a part of the administrative process which first should be exhausted.

In 1 Barron and Holtzoff, Section 65, Exhaustion of Other Remedies, at page 355, such treatises have this to say on such point:

> In theory it is only administrative remedies which need be exhausted, and there is no requirement to exhaust a state judicial remedy before coming to federal court. However the mere fact that a remedy is available before a court does not make it judicial for purposes of this test. If the state court action is a part of the administrative process, the remedy is an administrative one and must be exhausted. Though the decisions are far from clear as to when a state court action is 'judicial' and when 'administrative', emphasis has been laid on whether the state court may substitute its 'legislative' order or regulation for that of the administrative agency.

In support thereof, on page 355, the following cases are cited among others:

Prentis v. Atlantic Coast Line Co., 1908, 29 S. Ct. 67, 211 U.S. 210, 53 L. Ed. 150.

Gilchrist v. Interborough Rapid Transit Co., 1929, 49 S. Ct. 282, 279 U.S. 159, 73 L. Ed. 652.

Baron v. O'Sullivan, C.A. 3d, 1958, 258 F. 2d 336.

Texas Education Code, Section 21.215 Appeals, in part reads as follows:

> (c) Either party to an appeal to the commissioner shall have the right to appeal from his decision to the State Board of Education, according to the procedures prescribed by the State Board of Education. The decision of the State Board of Education shall be final on all questions of fact, but shall be subject to appeal to the district court of any county in which such school district or portion thereof lies, if the decision of the State Board:
>
> (1) is not supported in the record by substantial evidence;
>
> (2) is arbitrary or capricious; or
>
> (3) is in error in the application of existing law to the facts of the case.
>
> (d) Trial procedure in the district court shall be the same as that accorded other civil cases on the docket of said court, with the decision of the trial court to be subject to the same rights of appeal under the Texas Rules of Civil Procedure as is accorded other civil cases so tried.

The following annotation and case are cited in the annotations in 42 U.S.C.A. following Section 1983:

> Federal jurisdiction should not be available under

guise of due process to every potential litigant who claims to have been wrongfully discharged from employment, where state administrative remedies are adequate. Bradford v. School Dist., No. 20, Charleston, S. C., D.C. S.C. 1965, 244 F.Supp. 768, affirmed 364 F. 2 d 185.

Petitioner commenced his alleged complaint under the administrative process available to him under the laws of the State of Texas, and at this point in such administrative proceeding, petitioner has a decision favorable to him. Such administrative remedy provided under the laws of the State of Texas is an adequate remedy, and petitioner is certainly in no position to complain about the adequacy of the remedy he selected or to complain about the result, which at this point is favorable to him. It is respectfully submitted that petitioner is estopped to complain about the remedy under the Texas administrative process which he initiated.

Petitioner's pleadings in connection with the adequacy of relief consist of conclusions wholly unsupported by any allegations of acts or facts upon which such conclusions could be based, except the record which he may have created for himself.

In petitioner's petition for writ of certiorari, on page 12, he states 'that no state remedy, either adequate or otherwise, is provided by the State of Texas which could even arguably support Mr. Ball's asserted right to re-instatement next year or his damaged claims (except back pay for his 1969-1970 teaching year) against the defendants.'

Such statement is exactly contrary to the conclusions of law found by District Judge Noel in the case of Bonner v. Texas City Independent School District, 305 F.Supp. 600 (D.C. S.D. Tex. 1969) where, at page 618, the court said:

> The State of Texas has provided a procedure for administrative review of cases like this one. [Action by teacher for injunction to require school district to offer teaching contract.] Tex. Rev. Civ. Stat. Ann. Art. 2654-7 Section 1 (1965).

Art. 2654-7 Section 1, V.T.C.S. has been carried forward into the Texas Education Code in Section 11.13(a) which reads as follows:

> Persons having any matter of dispute among them arising under the school laws of Texas or any person aggrieved by the school laws of Texas or by actions or decisions of any board of trustees or board of education may appeal in writing to the commissioner of education, who, after due notice to the parties interested, shall hold a hearing and render a decision without cost to the parties involved, but nothing contained in this section shall deprive any party of any legal remedy.

The School District has also found no Texas case closer on point than the case of Ramos v. Guerra, 311 S.W. 2d 869 (Tex. Civ. App. 1958) N.W.H., where an injunction was granted reinstating a teacher who held a valid teacher's contract.

However, important public policy considerations of the State of Texas concerning education are involved in the matter of the length or duration of a teacher's contract.

In Fromen v. Goose Creek Independent School District, 148 S.W. 2d 460 (Tex. Civ. App. 1941, error dismd, judgment correct), a 'tenure plan' adopted by the school district was held void on two grounds: First as being opposed to Article 2781, V.T.C.S. (the predecessor to Section 23.28, Texas Education Code) specifying the length of terms for which teachers may be employed by school districts, and, second as being opposed to the public policy of the State of Texas.

That in addition to the allegations of federal questions raised by petitioner, there are questions of state law and public policy.

According to 1 Barron and Holtzoff, Section 64, Abstention From the Exercise of Jurisdiction, at page 340, the treatises state that the case of Railroad Commission of Texas v. Pullman Co., 1941, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971, if not the first, is surely the leading case for the entire abstention doctrine.

The abstention doctrine has been applied even where plaintiff

is claiming a denial of his civil rights; however, it is pointed out on page 342 of 1 Barron and Holtzoff that in the lower courts, at least, there has been some reluctance to apply the doctrine as rigorously in civil rights cases. One case, among others, cited at page 342 of 1 Barron and Holtzoff is the following annotation:

> Where South Carolina statute requiring Negro school teachers, as condition of employment, to submit sworn statements concerning membership in N.A.A.C.P., and prohibiting employment of teachers who were members, had not yet been construed by State Court, three judge federal district court would stay action by Negro school teachers for determination of its constitutionality until such State Court construction, even though statute was clear, and though stay order would involve delay, inconvenience and cost to parties. Bryan v. Austin, D.C. S.C. 1957, 148 F. Supp. 563, vacated as moot 77 S.Ct. 1396, 354 U.S. 933, 1 L. Ed 2d 1527.

Petitioner selected his forum under the administrative process accorded to him under the laws of the State of Texas several months prior to the filing of his suit in the United States District Court.

Petitioner elected to bypass his opportunity of proceeding directly to the United States District Court with his alleged federal claims. Instead, he voluntarily and of his own volition submitted his challenge on the same alleged federal claims to state administrative action. Having initially selected the remedy of administrative review as provided under the laws of the State of Texas, petitioner is now estopped to claim such remedy is not adequate, and he has waived his right, if any he ever had, to forsake such administrative review.

In the absence of some compelling reason and in the absence of a strong showing on the part of petitioner that the administrative remedy which he chose and launched is inadequate, he has waived his right, if any he may have, at this point in time while mid-stream of the administrative process, to forsake such remedy. Petitioner should not be permitted to flee

at whim to another forum and should be estopped from so doing.

In 1 Barron and Holtzoff, Section 65, Exhaustion of Other Remedies, page 353, it is reported that:

> In a leading case the Supreme Court spoke of 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'

and in support of such statement the work cites the case of Myers v. Bethlehem Shipbuilding Corporation, 1938, 58 S.Ct. 459, 463, 303 U.S. 41, 50-51, 82 L. Ed. 638.

Additional cases are cited in the pocket part to 1 Barron and Holtzoff, page 289 (pocket part) to support such proposition of exhaustion of other remedies. One is:

> Availability of adequate administrative remedy precludes granting of injunctive or declaratory relief. Caribbean Atlantic Airlines, Inc. v. Leeward Islands Air Transport, C.F. Puerto Rico 1967, 269 F. Supp. 231.

Another case is cited at page 292 (pocket part) of 1 Barron and Holtzoff to support such proposition, which annotation follows:

> Issues posed in action by airlines for judgment declaring that New York State Commission for Human Rights was without jurisdiction to apply age discrimination provisions of New York Law Against Discrimination to airlines' stewardesses engaged in flights in interstate and foreign commerce were not ripe for judicial review where there was considerable doubt that airlines would be subjected to New York statutory provisions, airlines had not taken advantage of opportunity to adduce proof in support of their objections before state authorities, and there was no showing of palpably unconstitutional exercise of authority threatening airlines with irreparable injury.

Allegheny Airlines, Inc. v. Fowler, D.C. N.Y. 1966, 261 F. Supp. 508.

Petitioner has voluntarily submitted all matters, including his federal claims, in the administrative procedures of the State of Texas. On September 15, 1969, he submitted his federal claims to the Board of Trustees of the School District. On November 19, 1969, he submitted his federal claims to Dr. J. W. Edgar, Commissioner of Education of the State of Texas. (See Appendix A hereto attached.) On January 5, 1970, petitioner again submitted his federal claims, this time to the State Board of Education, and received a decision favorable to him. Only after the hearing before the United States District Court on March 20, 1970, did petitioner first attempt to remove his federal claims from the administrative proceedings. That was when the matter was already pending, on appeal, in the Second 38th Judicial District Court of Kerr County, Texas.

Petitioner first commenced action, including the assertion of all of his federal claims, under the State of Texas administrative remedy procedure and then, thereafter, came to the federal court. Petitioner was not unwillingly sent to the State of Texas remedies under any federal order, decision, rule or procedure; but, on the contrary, petitioner commenced state action asserting all of his federal claims, then came to federal court. This is a maneuver sharply disapproved by the Supreme Court (Sweet Briar Institution v. Button, 280 F. Supp. 312, D.C. W.D. Va. [1967] at pages 315-316.) Beginning at page 466, the Supreme Court, in disapproving such maneuver in the case of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) said:

> But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule

> in Button, when we stated that a party elects to forgo his right to return to the District Court by a decision to 'seek a complete and final adjudication of his rights in the state courts.' We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then–whether or not he seeks direct review of the state decision in the Court–he has elected to forgo his right to return to the District Court.

In light of the facts of this case, especially the submission by petitioner of all his federal claims to state administrative action, it is respectfully submitted that this Honorable Court should not permit such a maneuver. In support thereof, School District would respectfully show that in the case of Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861 (5th Cir. 1966), at page 862, the Court said:

> In these circumstances, once Frazier submitted his challenge to state administrative action to state judicial review, the only appropriate federal forum for review of his alleged federal claim of discrimination was the United States Supreme Court. He bypassed that opportunity. The district court therefore correctly determined it had no jurisdiction.

In another case of the 5th Circuit, it was held that with litigation pending in the State Court, no review by the United States Supreme Court having been sought, the District Court had no jurisdiction. Brown v. Chastain, 416 F. 2d 1012 (5th Cir. 1969).

Nothing could be more clear than that petitioner invites the State Court to dispose of the pending litigation adversely to him. Petitioner makes this his position and intent manifest in his Second Amended Answer filed in the District Court of Kerr County, Texas. To be sure, it is sworn pleading, signed and sworn to by both petitioner and his attorney before a Notary Public.

In Randell v. Newark Housing Authority, 384 F. 2d 151 (3rd

Cir. 1967), certiorari denied 383 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 138, at page 156, the Court said:

> A party cannot refuse to make any use of a system of 'administrative,' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking.

It is pointed out in the Court's note 11 at page 156 of the above cited case that the Court's decision was not based on the rational of exhaustion of state remedies.

The position which petitioner intends to take in the State Court proceeding has been stated by the attorney for petitioner as that of 'laying down and playing dead.' This can hardly be said to contemplate a good faith attempt on petitioner's part to complete the proceedings in the State Court in an adversary manner. The State Court may be embarrassed by such displayed intent which tends to cast the State Court as a secondary, subordinate and inferior tribunal to be paid lip service only and treated as merely a procedural stepping stone to higher, superior and better justice before the courts of the Federal system. The undersigned attorney does not say that this is the overt and conscious intent of petitioner and his attorney, but, nevertheless, it is the effect and the end result. The citizens of the State of Texas have a right to respect and honor both of their court systems.

In Cobb v. City of Malden, 202 F. 2d 701 (1st Cir. 1953) at page 704 the Court said:

> In the instant case, we are confronted with a situation where the enforcement of the federal cause of action against defendant City of Malden clearly contravenes the state policy reflected in the provision of an exclusive remedy for deficiency in appropriations for the public schools. Such enforcement seems neither necessary nor proper in this case. Although a state remedy cannot operate to deprive a federal court of jurisdiction, see Thompson v. Gibbes, D. C., 1945, 60 F. Supp. 872, it may persuade a federal court to

> decline to exercise jurisdiction. A federal court of equity 'may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer.' Securities & Exchange Comm'n v. U. S. Realty & Improvement Co., 1940, 310 U. S. 434, 455, 60 S. Ct. 1044, 1053, 84 L. Ed. 1293. Furthermore, it may, in its discretion, refuse 'to give a remedy which would work a public injury or embarrassment.' United States ex rel. Greathouse v. Dern, 1933, 289 U. S. 352, 360 53 S. Ct. 614, 617, 77 L. Ed. 1250. Since plaintiffs have apparently not even attempted to utilize the available state remedy, and since their injuries may be adequately compensated by recovery in their action against the other named defendants, it is proper for a court to decline to exercise its jurisdiction.

Nowhere, at any time, has petitioner shown, except by the rankest sort of conclusion, that the administrative remedy provided by the State of Texas, which he invoked, is not an adequate remedy.

In Whitner v. Davis, 410 F. 2d 24 (9th Cir. 1969) at page 29, the Court said:

> If the administrative remedy designed to forestall a threatened discharge was adequate, Mrs. Whitner's refusal to make use of it constituted an acceptance of the discharge and prevents her from establishing a claim under the Civil Rights Act.
>
> [Note: On said page 29, at note 5 the Court refers the reader to a comprehensive review of the reasons why litigants should exhaust administrative remedies designed to forestall threatened governmental action as a precedent to resort to courts after the action has occurred in Craycroft v. Ferrall, 9th Cir., 408 F. 2d 587.]

In Craycroft v. Ferrall, 408 F. 2d 587 (9th Cir. 1969) at page 594, the Court reviews reasons why litigants should exhaust administrative remedies as follows:

> Like any other rule, the requirement of exhaustion of administrative remedies prevails whenever the purposes for the rule will be served in the context of a particular case. Among these purposes, all of which generally point to the efficient functioning of our federal legal system, are the following: (1) to avoid excessive encroachment by the judiciary into areas designated by the Constitution or Congress to be within the fundamental responsibility of the legislative or executive branches of the federal government; (2) to avoid interference with the orderly functioning of the administrative process; (3) to discourage a party from 'shopping' for a favorable forum; (4) to relieve the courts of the necessity of deciding constitutional questions or interpreting statutes in matters of public import when recourse to administrative channels might supply relief or moot the controversy; (5) to require administrative completion of a record involving special areas of administrative expertise of complicated or close issues of fact; (6) to avoid advisory opinions and to conserve judicial energies in cases wherein, if action taken at a lower level of the administrative hierarchy is affirmed, the aggrieved party presumably could yet hope for relief by pursuing his administrative appeals.

and at page 593 in the Craycroft Case, id., the Court quoted from Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 149 (1950) at 132, 71 S. Ct. at 151, the following:

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the

> occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created***.

In the case of United States v. Bradt, 280 F. Supp. 858, U.S. C.D. Calif. 1968, at page 859 the Court said:

> In this Circuit, exhaustion of administrative remedies is viewed as more than a condition precedent to bringing action; it goes to the very jurisdiction of the court. Hills v. Eisenhart, 156 F. Supp. 902 (N. D. Calif. 1957), aff'd 256 F. 2d 609 (9th Cir. 1958), cert. denied 358 U. S. 832, 79 S. Ct. 53, 3 L. Ed. 2d 70 (1958). The issue being one of subject matter jurisdiction, it may be raised at any time.

Petitioner's complaint was correctly dismissed by the United States District Court because of his avowed intent not to follow in a faithful and effective manner the administrative remedy he voluntarily elected. In the case of Bradford v. School District No. 20, Charleston, South Carolina, 244 F. Supp. 768, D.C.E.D. South Carolina, 1965, affirmed 364 F. 2d 185 (4th Cir. 1966), the plaintiff was suspended or dismissed from his teaching position. Plaintiff failed to follow the administrative procedure required of him under state law, and at page 772 the Court said:

> This court should not interpose and substitute its judgment and authority for that of the local and state authorities unless and until such actions are clearly warranted to safeguard and protect rights guaranteed by the Constitution.

and at page 773 the Court said:

> Plaintiff has an opportunity, indeed the right, to have a full hearing before the County Board of Education, the State Board of Education and the State Courts, any of which bodies can order that he be reinstated in

his teaching position.

****

> That controversy, however, would be peculiarly within the jurisdiction of the courts of the State of South Carolina and not this court since there is no diversity of citizenship between plaintiff and defendants. The federal jurisdiction should not be available to every potential litigant who claims to have been wrongfully discharged from his employment, under the guise of the denial of 'due process', where state administrative remedies are adequate to redress his alleged wrongs.

In the case of Bliss v. Shore, 279 F. Supp. 646, D.C.W.D. Pa. 1968, at page 647, the Court said:

> As to the claim for a declaratory judgment...it should not be used to supplant or supersede the time-honored doctrine recognizing the primary jurisdiction of an administrative agency, or requiring adherence to the precise statutory scheme or pattern for obtaining judicial review.

As to the burden on petitioner, the Court at page 713 in the case of Phalke v. Merwin, 161 F. Supp. 710 D.C. Virgin Islands, said:

> The plaintiff, having been accorded an opportunity to know the charges against her before her dismissal and an opportunity to answer thereto, had the burden diligently to assert her rights by appeal to the Commission as authorized....

Failure to exhaust her administrative remedies precluded her from obtaining judicial relief and the Court dismissed her complaint.

In Baron v. O'Sullivan, 258 F. 2d 336 (3rd Cir. 1958), at

page 337 the Court asked and then answered this question:

> May a litigant properly seek the remedy of a federal court under the Civil Rights Act before exhausting the available administrative remedies of the state?

and at page 338 the Court stated its rational as follows:

> Although the usual reason given for the requirement of the exhaustion of administrative remedies is the hesitation of the courts to interfere with state legislative processes, there is a more compelling one, as is apparent here. Appellant alleges a denial of a federally-protected privilege. The decision of the Board of Examiners of Jersey City, reviewable as it is both by the commissioner and the state board, is in a true sense interlocutory. It is merely a tentative determination subject to revision at the discretion of other agencies which are an integral part of the same legislative scheme. We cannot know, therefore, whether the privilege asserted has been denied until the state board has finally made its decision.

It seems obvious what petitioner is intending to do. He initiates the action under the State of Texas administrative procedures and asserts all of his federal claims, then comes to federal court and files suit. Then, he runs back to the State Court and states he now wishes to withdraw from the State Court his federal claims, but will lay down and play dead in the State Court so as to make record to come back to federal court to review the whole matter. And all of this without any showing, except the rankest sort of conclusions of the pleader, that he is entitled to have this Court make a teaching contract for the future and that he has no adequate remedy under the State procedures, wherein at the present time, he is prevailing.

In Brown v. Chastain, 416 F. 2d 1012 (5th Cir. 1969) beginning at page 1013 the Court said:

> As stated in Pilkinton v. Pilkinton, 8 Cir. 1968, 389 F. 2d 32, '[i]t is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the ... [Florida] State Courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts.' Id. at 33. The decision of a federal constitutional question by a state court does not warrant a mandatory injunction in the nature of mandamus nor an order striking its decision even if erroneous. 'State Courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.'

In 68 Colum. L. Rev. 1201 (1968), Exhaustion of State Remedies Under the Civil Rights Act, at page 1206 the note has the following to say regarding exhaustion of state administrative remedies:

> Whether to require the exhaustion of state administrative remedies is a more difficult question. A strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a federal court with local factors that legitimately affect administration. Moreover, the states, as well as the federal government have an interest in providing a means whereby official abuse can be corrected without resort to lengthy and costly trial. Thus, the same considerations which support an exhaustion requirement in suits against a federal agency in federal court or a state agency in state court are relevant. In addition, a federal court adjudicating a suit under the Civil Rights Act must consider the

> implications of division of responsibility under a federal system of government. The development of the exhaustion doctrine represented, at least in part, an attempt to minimize intergovernmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs.

In Burford v. Sun Oil Co., 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), at page 317, 63 S. Ct. at page 1099, the Supreme Court said:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'

In Bonner v. Texas City Independent School District, 305 F. Supp. 600 (D.C. S.D. Tex. 1969) at page 618 the Court said:

> More generally, this Court believes that proper respect for a federal system embracing states which have duties and responsibilities of their own requires federal courts, at the very least, to insist that persons aggrieved by a State's operation of its system of public education exhaust the administrative remedies provided by the State for the correction of abuses. Language in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961) and McNeese v. Board of Educ., 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), it is true, suggests that exhaustion of state remedies can never be required in suits brought pursuant to 42 U.S.C. Section 1983. Neither Monroe nor McNeese, however, presented the precise issue

which is now before this Court. Monroe did not involve the State's interest in running its system of public education, and in McNeese, the procedure for review was inadequate. It has been argued that these cases should not, as a matter of policy, be read as precluding courts from requiring the exhaustion of state remedies in appropriate cases. Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv.L.Rev. 1486 (1969). The Court finds that the State's special interest in overseeing the operation of its system of public education makes this an appropriate case for requiring the exhaustion of the remedies made available by state law. In paragraph (3-c) it was noted that the State of Texas has provided a procedure for administrative review of cases like this one, and that plaintiff does not attack the adequacy, availability, fairness, or effectiveness of this procedure. Comity does not allow this Court to permit plaintiff to bypass appropriate administrative procedures. Whether comity also requires a federal court to insist on the exhaustion of state judicial procedures may be left to another case.

Judge Noel in Schwartz v. Galveston Independent School District, 309 F. Supp. 1034 (D.C. S.D. Tex 1970) said, at page 1048:

> Finally, supposing that Section 1983 forbids requiring the exhaustion of any State remedies, it becomes my duty to abstain. Burford v. Sun Oil Co., [319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)] supra. No case, except perhaps Burford itself, could fit more precisely than this one, the tests for abstention there formulated. Involved is a domestic activity of more importance to the State of Texas than the conservation of its mineral resources--the development of its greatest resource, its children.

Judge Spears, in Wood v. Alamo Heights Independent School

District, 308 F. Supp. 551 (D.C.W.D. Tex. 1970) affirmed, 433 F. 2d 355 (5th Cir. 1970), [regulation governing length of hair of students upheld] said at page 554:

> This Court's sentiments were well expressed by Judge Lawrence in the case of Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (S.D. Ga. Nov. 17, 1969), when he said:
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> ***
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> 'Of course, rules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools.'

Stevenson v. Board of Education of Wheeler County, Georgia, 426 F. 2d 1154 (5th Cir. 1970) involved a civil rights case brought by three male high school students who were suspended from school for refusing to shave. The Court of Appeals held that evidence supported finding that shaving was a part of good grooming, that a failure to shave was a departure from norm which had a diverting influence on student and that the findings and conclusions of fact established that the rule in question was founded on a rational basis.

The Court of Appeals, after reviewing Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967), Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968), King v. Smith, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 and others, at page 1157 of the Stevenson Case, supra, said:

> We do not take these cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such

prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institutional sense that it is ripe for adjudication. On finality, cf. Scoggin v. Lincoln University, W.D. Mo. 1968, 291 F. Supp. 161, 173 (dictum in student suspension case).2 Cf. also Whitner v. Davis, 9 Cir., 1969, 410 F. 2d 24, 28, American Commuters Assoc. v. Levitt, 2 Cir., 1969, 405 F. 2d 1148, 1150-1151.

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We repeat what the court said in Griffin v. Tatum [425 F. 2d 201 (5th Cir. 1970)], supra:

'This court held in Ferrell v. Dallas Independent School District, 5 Cir., 1968, 392 F.2d 697, that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation. We have not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hairstyles. Such regulations and regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance as between the rights of individual students and the rights of the whole in the functioning of schools. The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process. Ferrell v. Dallas Independent School System, supra, at p. 703. That such regulations may be necessary and, if so, that they may be promulgated and enforced, is also clear from the tenor of Tinker v. Des Moines Community School District, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731.

In Jeffers v. Yuba City Unified School District, 319 F. Supp. 369 (D.C. E.D. Calif. 1970) the court held that the high school

regulation prohibiting beards among other regulations of hair was reasonable and rationally related to educational process and did not deprive students of their constitutional rights. In the matter of the assertion of right of privacy or personal liberty, the students relied primarily on Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). At page 371 the Court said:

> In reading the opinions of the majority it becomes evident that the only unifying factor is the feeling of all the majority that it was abhorrent to our system of jurisprudence for the legislature to invade the privacy of the marital bedroom and prohibit the right of husband and wife to choose whether they will practice birth control or not.

but regarding the case there before the court, at page 371:

> Here the subject of dispute is the right of students to wear their hair publicly, in a school setting, as they will.

In Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F. 2d 1153 (8th Cir. 1969) the court held that plaintiff Negro teachers who failed to show any racial discrimination were not entitled to relief under civil rights statutes, and that under Arkansas law giving school board absolute right not to rehire teacher, disagreement between teachers and principal who recommended that they not be rehired was an internal matter to be handled by school board and did not present any federal due process issue.

On speaking on the matter of re-employment of teachers in Arkansas where the school teachers are not covered by any type of civil service or tenure law, the Court at page 1158 said:

> While the school boards in Arkansas have the right to decide whom they are going to employ or re-employ, the basis for failing to re-employ must not be on impermissible constitutional grounds. Smith v. Board

of Education of Morrilton School District No. 32, 365 F. 2d 770 (8 Cir. 1966) (racial discrimination); Johnson v. Branch, 364 F. 2d 177 (4 Cir. 1966) cert. denied 385 U. S. 1003, 87 S. Ct. 706, 17 L. Ed. 2d 542 (racial discrimination); Shelton v. Tucker [364 U. S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)]....

and at page 1159 the Court said:

> We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiff has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and right to retain the position, except for cause. And 'for cause' presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution.

In Hopkins v. Wasson, 227 F. Supp. 278 (D.C. E.D. Tenn. 1962), affirmed 329 F. 2d 67, certiorari denied, 379 U. S. 854, 85 S. Ct. 102, 13 L. Ed. 2d 57, at page 279 the District Court said:

> In her complaint, the plaintiff alleges merely that the defendants failed to rehire her [teacher] at the expiration of the 1959-1960 school year. There is no allegation that the plaintiff's contract was breached or that the obligation thereof was impaired. Upon the contrary, the complaint acknowledges that the

> plaintiff's contract had expired, and further that the plaintiff was not on tenure under the laws of the State of Tennessee. Accordingly, she had no right, statutory or contractural, to be rehired, and nothing in Title 42 U.S.C.A. [Sections] ...1981-1988 entitles her to redress for not being rehired under these circumstances.
>
> Nor does the plaintiff make an adequate claim that the defendants unconstitutionally discriminated against her in failing to renew her contract. In this connection it is well to compare the present case with Brooks v. School District of City of Moberly, 8 Cir., 267 F. 2d 733, where the plaintiffs failed to recover upon an alleged civil rights violation much stronger than that now before the Court.

In Griffin v. Board of Trustees of St. Mary's College, 265 A. 2d 757 (Court of Appeals of Maryland, 1970) at page 759 the court said:

> Griffin concedes that he does not have tenure and that, absent the 'Statement of Policy,' the college had the right to elect not to renew his contract without a hearing and without giving him reasons therefor. His concession is in accord with the weight of authority. See Williams v. School District of Springfield R-12, 447 S. W. 2d 256, 270 (Mo. 1969; Bonner v. Texas City Indep. School District, 305 F. Supp. 600, 618 (S. D. Tex. 1969); and Parker v. Board of Education, 237 F. Supp. 222, 227 (D. Md. 1965), aff'd per curiam, 348 F. 2d 464 (4th Cir. 1965).

In Williams v. School District of Springfield R-12, 447 S. W. 2d 256 (Mo. 1969) at page 262 the court said:

> It is generally stated that a school district has the absolute right to decline to employ or re-employ any applicant or teacher for any reason whatever. 47 Am. Jur., Schools, Sec. 114....Their discretion is broad,

and when such discretion is exercised in good faith and not contrary to law, the courts are loath to interfere to aid anyone whom the board does not desire to employ. However, the basis for failure to re-employ must not be on impermissible constitutional grounds. [Citations omitted.]

and further at page 270 the court said:

> In Parker v. Board of Education of Prince George's County, Md., 237 F. Supp. 222, loc. cit. 228, affirmed 348 F. 2d 464 (4th Cir.), cert. den. 382 U.S. 1030, 86 S.Ct. 653, 15 L.Ed.2d 543, it was stated: 'Generally, in the absence of statute or unreasonable discrimination, a public employee may be summarily discharged from government service, without the necessity of a hearing, and such action does not amount to a denial of due process of law. (Citation following omitted.)

Jones v. Hopper, 410 F. 2d 1323 (10th Cir. 1969, En Banc) cert. denied, 397 U.S. 991, 90 S.Ct. 1111 25 L.Ed.2d 399 (1970) involved an action by a college professor who was not reappointed. The Court of Appeals held that the complaint alleging that, in refusing to appoint the college professor after the term of his employment had expired, college board of trustees denied him a right of expectancy to continued employment because he had sought to exercise his constitutional rights of speech, publication and religion was not sufficient to identify an interest or right secured by Civil Rights Act, in absence of an allegation that conditions of employment were unreasonable or an allegation that board of trustees had gone beyond authority granted to them by Colorado statutes.

On page 1327 the Court said:

> The Supreme Court has consistantly held, 'the interest of a government employee in retaining his job, can be summarily denied. It has become a settled

principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.***This principle was reaffirmed quite recently in Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012.' [Foot Note 12 cites Cafeteria & Rest. Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 896-897, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)] The foregoing must be read in the light of the principle enunciated in Pickering v. Board of Education [Foot-Note 13 citation, 391 U.S. 563, 568, 88 S.C. 1731, 20 L.Ed.2d 811 (1968)], which quotes Keyishian v. Board of Regents [Foot Note 14 citation, 385 U.S. 589, 605, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)].

and on page 1328 the Court says:

'It is clear that a professor is not an officer, but an employee under contract to fill a chair of learning.' [Foot Note 17 cites State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372, 373 (1904). See also 75 A.L.R. 1352 (1955). 'The courts are almost unanimous in holding that the position of a teacher is that of an employee, resting on the contract of employment, and not that of public officer.']

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The alleged interest deprived was in the appointment for a third year. It is admitted he did not have a tenure privilege either by Colorado law or contract.

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Southern Colorado State College is a state academic institution organized and existing under Colorado law which vests the government and management of its affairs in a board of trustees which has among other vestitures 'power to appoint and remove all

subordinate officers, professors, teachers, assistants, employees or agents, in, or about, or concerning said college, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates.***'

His claimed interest must find its source in his expired appointment which constituted whatever contract existed....

and the court goes on to say at page 1329:

The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest. [Foot Note 19 cites Freeman v. Gould Special School Dist. 405 F.2d 1153, 1158 (8th Cir. 1969); Cobb v. Howard University, 70 App. D.C. 339, 106 F.2d 860, cert. denied, 308 U.S. 611, 60 S.Ct. 175, 84 L.Ed. 510 (1939)] 'One has no constitutional right to a 'remedy' against the lawful conduct of another.' [Foot Note 20 cites Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 864, 81 L.Ed. 1229 (1937)].

As demonstrated above the right, privilege or immunity Jones alleges he was deprived of is non-existant.

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" 'Will the interests of an institution of learning be promoted by dispensing with the services of a particular professor?' And yet if we assume that the statute of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their

experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist." [Foot Note 22 cites Ward v. Board of Regents, 138 F. 372, 377 (8th Cir. 1905)].

"It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education." [Foot Note 23 cites Greene v. Howard University, 271 F. Supp. 609, 615 (D.D.C. 1967)].

The primary thrust of petitioner's reasons for granting the writ are set forth on page 9 of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit where the petitioner says:

The order of dismissal entered by the District Court and sanctioned by the Court of Appeals directly conflicts with this Court's rulings in Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); and with the recent holdings of the Fifth Circuit in Moreno v. Henckel,

431 F.2d 1299 (5th Cir. 1970) and Rainey v. Jackson State College, 435 F. 2d 1031 (5th Cir. 1970).

Justice Clark was one of the three Circuit Judges hearing this case in the Court of Appeals for the Fifth Circuit. See pages A-1 and A-2 of Appendix A of petitioner's petition for writ of certiorari.

It seems inconceivable that a Circuit Judge of the caliber of Justice Clark could have forgotten, on December 17, 1970 and on May 4, 1971, his written opinion of August 10, 1970 in the case of Sindermann v. Perry, 430 F. 2d 939 (5th Cir. 1970) involving a suit by Professor Sindermann against the Board of Regents of Odessa Junior College alleging that the action of the regents in refusing to offer the professor a new term of employment was based solely on his exercise of First and Fourteenth Amendment rights, expression, etc. Writing for the Court, Justice Clark said on page 940:

> Shortly after the summary judgment was appealed, this court decided Pred v. Bd. of Public Instructions, 415 F. 2d 851 (5th Cir. 1969), which classifies the rights of persons, circumstanced such as plaintiff as constitutional rather than contractural. Pred aligned this court with the 4th Circuit [Foot Note 1 cites Johnson v. Branch, 364 F. 2d 177 (4th Cir. en banc, 1966), cert. denied 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967)] and against the 10th Circuit [Foot Note 2 cites Jones v. Hopper, 410 F.2d 1323 (10th Cir. en banc, 1969), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970)] in this as yet unresolved conflict between circuits.

and Justice Clark writing for the court said on page 942:

> Pred v. Bd. of Public Instruction, supra, invalidates the basic legal premise of the [District] Court's summary judgment [finding the contract rights of the parties clear the District Court entered summary judgment against the professor]. There we said:

'Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by Sec. 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractural one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights---the right not to be punished by the State or to suffer retaliation of its hand because a public employee persists in the exercise of First Amendment rights.' (415 F.2d at 856).

Speaking through Justice Clark, on pages 943-945, the Court sets out very elaborate standards for Academic Hearing Procedures.

Justice Clark also wrote for the Court in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). The District Court had denied relief to Dr. Ferguson after a plenary trial of his claim that the defendant officials of Prairie View A&M College terminated his employment as an instructor. Finding no violation of any right cognizable by the court below as to the termination of his employment, the 5th Circuit Court of Appeals affirmed the District Court's final judgment insofar as it dismissed that claim. At the threshold the court sought to determine Dr. Ferguson's legal relationship to the college, and on page 855 the Court said:

It is admitted that he was employed for a limited period of time, that that time period expired and no new contract for subsequent employment was tendered to him. It is also admitted that he had no tenure, and thus no right to additional employment. Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). But a college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts

regulations or standards of practice governing non-tenure employees which create an expectation of reemployment. Greene v. Howard University, 134 U.S. App. D.C. 81; 412 F.2d 1128 (1969).

In the Ferguson Case, supra, the defendant college consistantly treated their action in Dr. Ferguson's case as a termination of his employment rather than a decision not to offer him a new or subsequent term of employment and the prevailing practice of such college was that a decision not to offer such an instructor a renewal contract of employment required a showing of cause.

Respondent has shown no such expectancy and there is no showing that there has ever been a practice of showing cause where there is a decision by School District not to offer a new contract.

And on page 857 of the Ferguson Case, supra, the Court goes on to say:

> The substance of due process requires that no instructor who has an expectancy of continued employment be deprived of that expectancy by mere ceremonial compliance with procedural due process. While he has no right to continued public employment, such a teacher may neither be dismissed or not be rehired for constitutional impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the Constitution. This rationale would even apply to a teacher without tenure or an expectancy of reemployment. Pred v. Board of Public Instruction, supra; Johnson v. Branch, 364 F. 2d 177 (4th Cir. En Banc, 1966), cert. den. 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967); Freeman v. Gould Special School District, supra; contra, Jones v. Hopper, 410 F.2d 1323 (10th Cir. En Banc, 1969), cert. den. 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

After having set the principles of law and standards of

academic due process controling in the Court of Appeals for the Fifth Circuit, the court then applied the facts thereto resulting in the following statement at page 859 of the Ferguson Case, supra;

> Here the proof before the district court shows that Dr. Ferguson exercised his rights of speech and association to such an extent as to seriously impair, if not to destroy, his effectiveness as an instructor in an organized program of academic tutoring. This was his choice to make. The college had no right to control his speech or to curtail his freedom of association, but they did have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly over- balanced his usefulness as an instructor.

In this case now before this Honorable Court it is respectfully submitted by the School District that petitioner has wholly failed to demonstrate that he has any Federally protected right which has been violated. The school regulation in question is not unreasonable and it is not irrational, but on the contrary, it is reasonably related to the successful and proper conduct of the educational process in the schools of said school district. Such rule is reasonably related to discipline and decorum within said School District as well as being reasonably related to cause no disruption, disturbance or distraction in the educational process. The regulation in question has for its purpose the maintenance of an effective and efficient school, the same being the furtherance of good educational practices and the maintenance of classroom order and school decorum. Further, said rule had for its purpose and as a part of its basis the educational responsibility of such School District to provide reasonable guidance and example and standards of appearance and decorum as an educational matter.

The efficient operation of an educational institution by its very nature requires discipline and good order to accomplish its educational purpose. Every educational institution must establish and require the observance of standards of conduct for

its personnel, administration, faculty and students. Based on such considerations the School District's regulation in question is reasonable and predicated upon a proper educational purpose. Petitioner's wearing of the beard prior to the time he was suspended from teaching in the classroom and subsequent thereto caused disruptions, disturbances and distractions in the educational process within the School District. The School District's enforcement of the regulation is directly related to the vital interests of education and no Federally protected right of petitioner has been violated.

Petitioner would have this Honorable Court believe that the Court of Appeals for the Fifth Circuit ignored its own opinions and decisions. It is difficult to conceive that the 5th Circuit Court of Appeals in less than three months could have forgotten the case of Thaw v. Board of Public Instriction of Dade County, Florida, 432 F.2d 98 (5th Cir. 1970) where at page 99 the court said:

> The authority in this Circuit requires school boards to provide notice and hearing before dismissing a public school teacher or college professor in either of two types of cases. The first type is that of a school teacher who has 'tenure' or a reasonable expectation of reemployment. Ferguson v. Thomas, 5th Cir. 1970, 430 F.2d 852. A public school teacher falling into this category may not be dismissed unless the school board first affords him a hearing at which the reasons for his termination are stated and the teacher is given an opportunity to refute the charges against him. This basic requirement protects the public school teacher who has been led to expect that he will be reemployed from being arbitrarily dismissed.
>
> The second type of case in which a school board has been required to provide a hearing is that of a school teacher who has no tenure or expectancy of reemployment, but who asserts that he has been dismissed for constitutionally impermissible reasons, either solely because of race or religion, or because he has attempted to exercise his first amendment rights.

Pred v. Board of Public Instruction, 5th Cir. 1969, 415 F. 2d 851.

> The school teacher in the instant case falls into neither of these categories. He offers no proof of any reasonable expectation of reemployment under the Florida statute, and he clearly has no tenure. ....As a matter of fact, appellant is in exactly the same position as the school teacher in Pred, supra....We expressly stated in that case that under such circumstances no right to reemployment exists. The right protected in Pred was rather a constitutional right, and this is the critical distinction between that case and ours.

In the Thaw Case, supra, the Court held that the county board of public instruction would not be required to grant a hearing to teacher who had no tenure or any reasonable expectation of reemployment or renewal of his contract where there was no assertion that the teacher had been dismissed for constitutionally impermissible reasons.

Another case which petitioner would have this Honorable Court believe the Court of Appeals for the Fifth Circuit ignored is the case of Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) where at page 947 the court said:

> Lucas [schoolteacher] had no tenure and his one-year contract was not breached. But his long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectible interest. [Citations ommitted.]
>
> *****
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> Our holding should not be misunderstood. In this instance [Lucas Case, supra] we know from the District Court hearing that the asserted reason for

termination involved a possible collision with Lucas' First Amendment rights. A hearing was mandatory, if desired by Lucas. But where the only matter in issue is a difference of view over a school board's exercise of judgment and discretion concerning matters non-constitutional in nature, the board is not required to conduct a hearing. Freeman v. Gould Special School District, 405 F. 2d 1153, 1161 (8th Cir. 1969) [Foot Note 2 reads 'Of course, we speak here of the teacher who has neither contract nor tenure provisions independently providing for discharge only for cause]. There are in-between situations which are somewhat more difficult. If the board asserts a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing. Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation. [Citations omitted].

In this case now before this Honorable Court, it is undisputed that petitioner has no tenure. He so admits in his petition for writ of certiorari at pages 10-11.

The Court of Appeals for the Fifth Circuit had before it the statement of facts and transcript from the hearing before the District Court, and, as in the Lucas Case, supra, the Fifth Circuit knew exactly what the assertions of petitioner were and are, and there can be no mistake about this.

The above synopsis of events set forth in the statement of facts clearly demonstrates that petitioner knew the reasons for his termination and he was afforded ample hearings. It is respectfully submitted that the School District fully complied with all of the more strict rules and principles of law of the Court of Appeals for the Fifth Circuit as required under the authorities of such Circuit, the same being Ferguson v. Thomas, supra; Pred v. Board of Public Instruction, supra; Sindermann v. Perry, supra; and Lucas v. Chapman, supra, and as required under the rule of Johnson v. Branch, supra, of the Fourth

Circuit, as distinguished from the holding of the Jones v. Hopper Case, supra, of the 10th Circuit.

As mentioned above, petitioner, on page 9 of his petition for certiorari, states that the Fifth Circuit Court of Appeals ignored holdings of this Honorable Court and holdings of the Fifth Circuit, and throughout his petition he goes into great length about the remedy underlying the Civil Rights Act being supplementary to any state remedy and asserting that the Court of Appeals for the Fifth Circuit required petitioner to exhaust state remedies.

Nothing could be more clear as to the position of the Court of Appeals for the Fifth Circuit than its statement on page 436 in the case of Hall v. Garson, 430 F. 2d 430 (5th Cir. 1970) where the Court said:

> This Court routinely rejects the cry that it is necessary to exhaust state remedies. See Orr v. Thorpe, 5th Cir., 1970, 427 F.2d 1129. And we here again reject it.

And this was said after the Court had cited Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968) and Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L. Rev. 1201 (1968).

Foot Note 11, at page 436 of the Hall v. Garson Case, supra, seems quite important and should not be overlooked. It reads as follows:

> There can be no doubt that until Monroe, McNeese, Damico and Houghton the conventional wisdom was that the exhaustion of state administrative remedies was required while there was no need to exhaust judicial remedies. C. Wright, supra....[Federal Courts, Section] 49 (2d Ed. 1970). Here, of course, only judicial remedies are involved. It may be that

> exhaustion of administrative remedies is still required at least to the extent that it is necessary to have an authoritative institutional decision or pronouncement. Thus it might be necessary to require a school student to seek school board review of a principal's action. Stevenson v. Bd. of Education of Wheeler County, 5 Cir. 1970, 426 F.2d 1154.

and on pages 436-437 the Fifth Circuit Court makes its position on the abstention doctrine very clear.

If there is any question about the position of the Fifth Circuit Court remaining, then attention is directed to the statement of such Court on page 1300 in the case of Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970) where the Court said:

> The district court not only abstained, but dismissed the complaint on the ground that a remedy was available to the plaintiffs in the Texas courts. That is not the law. 'The fact that a state remedy is available is not a valid basis for federal court abstention.' (Citation omitted.)

And the Fifth Circuit Court goes on to state on page 1305 that:

> If there is one thing certain about the legislative history of the [Civil Rights] Act, it is that Congress, open-eyed, deliberately set out to alter the so-called 'delicate balance' between the state and the federal government so that federal courts could effectively protect federal rights.

And further, on page 1309 the Court writes:

> Mr. Justice Harlan, in a concurring opinion in Zwickler [v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967)] has pointed out that the Supreme Court has approved abstention in situations when 'the federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law,' or 'in

situations in which the exercise of jurisdiction by a federal court would disrupt a state administrative process; interfere with the collection of state taxes, or otherwise create 'needless friction' between the enforcement of state and federal policies.' 389 U.S. at 455, 456, 88 S.Ct. at 400. The present situation [Moreno v. Henckel, supra, involving a discharged municipal employee] is within none of these categories. There are no pending administrative proceedings to disrupt. There are no legal proceedings or about to be brought in the state courts.

In this case now before this Honorable Court, the record clearly shows that there is now pending in the state court an administrative proceeding, which said administrative proceeding was initiated by petitioner and which administrative proceeding has been halted or put in the refrigerator, so to speak, by the petitioner himself, although he is at this point in the proceeding prevailing.

Again, respondents would point out to this Honorable Court that petitioner has not demonstrated that he has any Federally protected right which has been violated.

Slightly over one month before the Court of Appeals for the Fifth Circuit handed down its first decision (see page A-1 of the Appendix A in petitioner's petition for writ of certiorari), the said Court handed down its decision in Wood v. Alamo Heights Independent School District, 433 F.2d 355 (5th Cir. 1970). At page 355, the Court said:

> This is another haircut case. The recent decisions of this court have pointed to the necessity that before the federal courts intervene in cases such as this there must be 'such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.' Stevenson v. Bd. of Education of Wheeler County, 426 F.2d 1154 [student grooming regulations]; cf. Lucas v. Chapman, 430 F.2d 945 [1970] (failure to renew teacher contract). The District Court entered its

opinion and judgment in this case prior to those decisions, therefore, we reach the merits instead of remanding to the local authorities.

And as to the merits of the case the court, on page 356, said:

> The District Court did not err in its conclusion that the regulation in question is not arbitrary or unreasonable and that it is sufficiently related to alleviating interference with the educational process. Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125 (1968); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969); Stevenson v. Wheeler County Bd. of Education, supra; Griffin v. Tatum, 425 F.2d 201 [1970].

The Texas Education Code, Section 23.26, in part reads as follows:

(b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.

(d) The trustees may adopt such rules, regulations, and by-laws as they deem proper.

In the case of Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex. Civ. App. 1945, error ref'd want of merit) at page 412 the Court said:

> It will be seen that the grant of power and authority to school boards is in general terms. The Legislature could not possibly foresee all problems and situations that would arise in the administration of the schools.....But, necessarily; school boards are given a wide discretion in such matters. They may make all such rules and regulations as in their judgment are necessary to maintain an 'efficient' system of schools, subject to the limitation that there be no abuse of discretion, and that such regulations be not arbitrary,

unreasonable or in violation of law.

Jackson v. Dorrier, 424 F. 2d 213 (6th Cir. 1970) which involved an action to enjoin enforcement of a school regulation which prohibited male students from wearing long hair, on page 217, quoted from Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) where the Supreme Court said:

> The problem posed by the present case does not relate to regulations of the length of skirts or the type of clothing, to hair style, or deportment. C.f. Ferrell v. Dallas Independent School District, 5 Cir. 392 F.2d 697.***393 U.S. 507-508, 89 S.Ct. 737.

and on page 218-219 the Court said:

> In Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228, the Supreme Court said:
>
> 'Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.*** By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.'
>
> In Tinker v. Des Moines Independent Community School District, supra, the Court said:
>
> '[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' 393 U.S. at 507, 89 S.Ct. at 737.

> In the absence of infringement of constitutional rights the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee.
>
> We follow Ferrell v. Dallas Independent School District, supra, in holding that the District Court committed no error in dismissing the present case.

In a proceeding on application to Mr. Justice Black, as Circuit Justice, Mr. Justice Black, in Karr v. Schmidt, _____ U.S. _____, 91 S. Ct. 592, _____ L.Ed.2d _____ (1971) denied the application to vacate stay of injunction pending appeal, thus not forbidding school authorities to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their visions pending appeal from an order enjoining enforcement of the rule. At page 542, it was said:

> I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race, but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students

must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students.

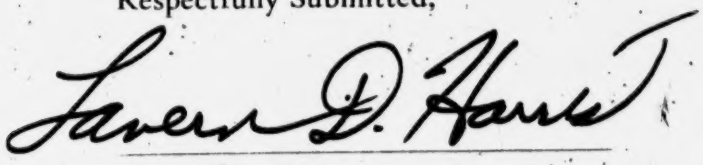
*****

Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 states. Perhaps if the courts will leave the states free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

CONCLUSION

From the foregoing statement of the facts and authorities, the respondents (School District) pray and request this Honorable Court to in all things deny the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further relief that respondents (School District) may be entitled.

Respectfully Submitted,

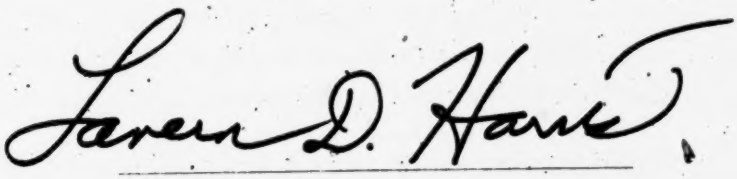


Lavern D. Harris
Realty & Trust Building
Kerrville, Texas 78028

Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for filing, that I personally mailed to Joe Mike Egan, Jr., 401 Junction Highway, Kerrville, Texas 78028, counsel for petitioner, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court, on the 22nd day of June, 1971.



Lavern D. Harris

APPENDIX A

STATE OF TEXAS	*	RE: GENE BALL
COUNTY OF TRAVIS	*	VS.
BEFORE THE	*	BOARD OF TRUSTEES OF
COMMISSIONER OF	*	KERRVILLE INDEPENDENT
EDUCATION	*	SCHOOL DISTRICT
		(KERR COUNTY), TEXAS

STATEMENT OF CASE

Gene Ball, appellant, had taught mathematics for six consecutive years prior to 1969-70 school year in the Tivy High School of the Kerrville Independent School District. He signed a contract to teach in the same assignment during 1969-70.

On the morning of Friday, August 29, 1969 he reported for duty wearing for the first time during his tenure a Van Dyke style beard. He attended then the orientation and building faculty meetings, after which he was notified by the high school principal to report to the superintendent.

The superintendent asked appellant to shave his beard before reporting to teach on Tuesday. Appellant declined to do so. The superintendent advised him that he should consider himself suspended until he did so.

On the first day of classes (Tuesday, September 2, 1969) appellant presented himself for duty wearing his beard, was advised by the principal that he was still under suspension, and was told to see the superintendent. Again the superintendent requested appellant to shave his beard and appellant declined again to do so.

By letter dated September 2, 1969, the superintendent formally notified appellant, in substance:

1. that appellant was suspended;

2. that a recommendation would be presented to the board of trustees requesting termination of appellant's contract;

3. that such recommendation could be averted if appellant would shave his beard; and

4. that appellant had a right to appeal the superintendent's action to the board.

A special meeting of the board, six members attending, was held on September 3, 1969 to consider the recommended termination of appellant's contract. Appellant was invited to attend with counsel. Appellant declined to appear but reserved the right to be heard on the board's decision.

The board voted (6-0) at such meeting to terminate appellant's contract. Appellant filed timely request for local hearing of his appeal. Subsequently, the board was presented with a petition bearing 194 names asking the board to reconsider appellant's contract termination.

On September 15, 1969, the board held an open meeting to hear appellant's appeal and to give reconsideration to its action terminating appellant's contract. A decision was delayed for further study.

On September 23, 1969, the board met in special session, reaffirmed its action of September 3, terminating appellant's contract, and approved payment of salary to appellant for the month of September only.

From such action appellant timely appealed to me. His appeal was heard by me on November 19, 1969 when all parties were present and represented by their respective counsel.

Appellee board contends herein that the superintendent's directive- request requiring appellant to shave his beard was reasonable, and that it was necessary to maintain and conduct proper discipline of scholastics at Tivy High School under the following circumstances and fact situation:

1. Appellant developed his beard during the summer months of 1969. Before the school term began, several citizens requested the superintendent and principal not to permit appellant to wear his beard in school classes. Five parents asked that their children not be assigned to appellant's classes if he persisted in being bearded.

2. The district's established policy prohibiting its students from wearing beards would be more and increasingly difficult to enforce if faculty members were privileged to wear beards. Thus appellant's beard would be disruptive to the well being or orderly operation of the high school. Testimony presented at the hearing before me by the principal was that more students than ever before had to be sent home at the beginning of this school year to shave their beards. This, he testified, was a result of the knowledge these students had of appellant's beard.

3. Appellant's beard was disturbing and disruptive to members of the faculty, all of whom were present at the August 29 orientation meetings. It was also in violation of the general rule of the school requiring that all members of the faculty use decorum in their dress and in their grooming.

4. Appellant's refusal to remove his beard at the request of the superintendent, predicated upon the above cited circumstances, constituted a lack of cooperation, insubordination, and a violation of the terms and spirit of his contract.

Appellant contends primarily that his election to wear a beard while employed by the district is protected as a constitutionally protected form of expression under the speech provisions of the First Amendment to the United States Constitution.

Appellant readily admits that Constitutional freedoms are not absolute but he maintains that they can be limited only where a compelling need can be demonstrated to offset the freedom.

He urges herein that such a need would have to be based on

more than a mere anticipation of harm or disruptive activities which could result from his wearing a beard; that there would have to be past experience to support the need and the anticipation of harm; and that the application of professional judgment would not suffice to abridge his freedom unless it is supported by evidence of past harm.

In furtherance of this primary contention, appellant presented as argument that:

1. There has been no bearded teacher in modern history in the district.

2. The district had no past experience of harm resulting from teachers having worn a beard. There was no compelling need existing on August 29, or September 2, 1969 to prohibit teachers from wearing a beard.

3. The superintendent's rule requiring appellant to shave his beard was wholly anticipatory. As such, it constituted a perspective judgment entirely unsupported by past experience of harm. It therefore was unconstitutional.

4. The board's action in supporting, as it did, the superintendent's rule and in dismissing appellant is therefore unconstitutional and appellant is constitutionally protected from its enforcement.

As a secondary contention, appellant argues that appellee board and administration have no formal policy and no rule which specifies that teachers be clean shaven. He was not therefore in violation of district policy.

DECISION

The facts are clear that the district had no written policy prohibiting beards. Some testimony was given to the effect that there was a long standing unwritten policy requiring decorum in dress which, the district urged construed, would prohibit beards. Such testimony, however, is not conclusive.

The superintendent's contention that teachers as professional people should not have their dress regulated by specific rules falls short in view of the fact that appellant was fired for violating a specific rule or request.

The basis for the discharge action herein, therefore, must be found in the general authority of the district to govern, operate and control in the affairs of the district, and under the terms of appellant's contract which requires appellant to be governed by reasonable rules made by the superintendent of schools (among others).

The question here is whether or not the rule laid down by the superintendent on August 29, 1969 that appellant must remove his beard as a condition to his being permitted to perform as a teacher under his contract was a reasonable and necessary rule at that time to ensure and preserve a normal and orderly operation of the school in the current school term.

The superintendent at that time had these facts to consider:

1. Problems about the beard were arising before school started as evidenced by protests from parents and other citizens made prior to the opening of school against appellant's beard. These included requests from five parents that their children not be assigned to appellant's classes so long as he wore a beard.

2. The district's established policy requiring all students to be clean shaven and the effect appellant's beard might have on the ability of the district to enforce such policy.

3. The immediate effect of appellant, who was conversant with student policy, appearing before the students wearing a beard. For the prior six years he had been exemplary as a faculty member in following the policy required of his students.

In addition to the above facts, the superintendent also was acutely aware and had to consider on August 29, 1969 the increasing number of student protest cases in the high schools of the state and the likelihood of student protests developing at

Tivy High School during the fall of 1969 from any unexpected deviation from its heretofore normal operations. He had to consider and did on August 29, 1969, whether or not the appearance of a bearded faculty member for the first time might be interpreted by students as a symbol of discrimination against their own rights and privileges.

In my best judgment and opinion, the actions of the superintendent and the board in requiring appellant to shave his beard as a condition of his continued employment, in light of the facts then before them, were reasonable and necessary. Appellant should voluntarily have been willing to comply with the superintendent's requests made on August 29, 1969, motivated and intended for the best interests of the school district, before he was told by the superintendent that he was being suspended.

Furthermore, I am not persuaded or convinced that appellant, at such time, was committed to a beard as essential to his personality, or as an integral part of his grooming. He had experimented with cultivating a beard in at least one previous summer, and on his own initiative, had voluntarily shaved it before school began.

He testified that growing or retention of his beard was not intended in any way to be a test of school policy. Whether or not he so intended, it was in fact considered by many citizens to be a test, as evidenced by public reaction created in protest against it and in support of it.

Undoubtedly, appellant was aware and knew of this reaction. As a professional teacher, acquainted and experienced with the disciplines and problems of school operations, he could, and should have taken such action prior to the opening of school to remove himself as a faculty member from being the cause of unnecessary controversy–whether it be cultivating a beard or some other act on his part. Such is my opinion as one engaged in public school administration.

Accordingly, I cannot support appellant in his action. It is my decision therefore, that I should and hereby do respectfully decline to overrule the final action of the Board of Trustees of Kerrville Independent School District taken on September 23, 1969.

Given under my hand and seal of office this 11th day of December, A.D., 1969.

/s/ J. W. Edgar
J. W. Edgar
Commissioner of Education